

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROGELIO MAY RUIZ,

Plaintiff,

v.

M. STANE, ET. AL.,

Defendants.

Case No. 1:22-cv-00236-DAD-HBK (PC)

FINDINGS AND RECOMMENDATIONS TO  
DENY PLAINTIFF'S MOTION TO  
PROCEED *IN FORMA PAUPERIS* UNDER 28  
U.S.C. § 1915 (g) AND/OR DISMISS  
ACTION WITHOUT PREJUDICE FOR  
FAILURE TO PROSECUTE

FOURTEEN-DAY OBJECTION PERIOD

ORDER TO ASSIGN A DISTRICT JUDGE

(Doc. No. 13)

Plaintiff Rogelio May Ruiz, a prisoner incarcerated at California State Prison, Corcoran, initiated this action by filing a pro se prisoner civil rights complaint under 42 U.S.C. § 1983 on February 22, 2022. (Doc. No. 1, “Complaint”). Plaintiff seeks to proceed in this action *in forma pauperis*. (Doc. No. 13, IFP). For the reasons discussed below, the undersigned recommends the district court deny Plaintiff’s IFP motion under 28 U.S.C. § 1915(g) because Plaintiff has had at least three actions or appeals that constitute strikes, and the Complaint does not establish that Plaintiff meets the imminent danger exception. Alternatively, or in addition to, the undersigned recommends the district court dismiss this action due to Plaintiff’s failure to timely file a first amended complaint in English as directed in the Court’s May 4, 2022 Order. (Doc. No. 17).

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## **BACKGROUND AND FACTS**

Plaintiff initiated this action by filing a § 1983 complaint in the Sacramento Division of this Court on February 22, 2022. (Doc. No. 1). On February 25, 2022, the case was transferred to this Division. (Doc. No. 4). Because Plaintiff did not accompany his Complaint with the requisite filing fee or an application to proceed *in forma pauperis*, on February 28, 2022, the Court directed him to do so within 30 days of receipt of the Court’s Order. (Doc. No. 6). The February 28, 2022 Order warned Plaintiff that if he “fails to timely comply with this order, the undersigned will recommend the Court dismiss this case for Plaintiff’s failure to comply with a court order and/or prosecute this action.” (*Id.*).

After Plaintiff failed to timely file an IFP or pay the filing fee, the undersigned issued amended findings and recommendations to the district court on April 14, 2022 recommending dismissal of this action without prejudice due to Plaintiff's failure to comply with the Court's February 28, 2022 Order and/or failure to prosecute providing Plaintiff 14 days to file any objections.<sup>1</sup> (Doc. Nos. 9, 10). During the objection period, Plaintiff filed an IFP motion. (Doc. Nos. 13, 16). On May 4, 2022, the undersigned recalled the amended findings and recommendations, struck the Complaint to the extent it was in Spanish and directed Plaintiff to file an Amended Complaint in English. (Doc. No. 17). In its May 4, 2022 Order noting that Plaintiff's Complaint was written entirely in Spanish, the Court noted that Plaintiff had in previous cases been warned that filings in federal court must be in the English language. (*Id.* at 2). Plaintiff was provided 30 days from receipt of May 4, 2022 Order to file an Amended Complaint in English. (*Id.* at 2-3). The May 4, 2022 Order further warned Plaintiff that failure to comply with the order would result in the recommendation that this case be dismissed for failure to comply with a court order and/or failure to prosecute the action. (*Id.* at 4). On May 31, 2022, the Court granted Plaintiff a 30 day extension of time to file an Amended Complaint in English. (Doc. Nos. 19, 20). As of the date on these Findings and Recommendations, despite being provided an enlargement of time, Plaintiff has not filed an Amended Complaint in English and

<sup>1</sup> The Amended Findings and Recommendations clarified a 14-day objection deadline, instead of a 30-day objection period, but was otherwise identical to the initial Findings and Recommendations.

1 the time to do so has passed.

2 **APPLICABLE THREE STRIKE LAW**

3 The “Three Strikes Rule” states:

4 In no event shall a prisoner bring a civil action or proceeding under  
5 this section if the prisoner has, on 3 or more prior occasions, while  
6 incarcerated or detained in any facility, brought an action or appeal  
7 in the United States that was dismissed on grounds that it was  
frivolous, malicious, or fails to state a claim upon which relief may  
be granted, unless the prisoner is under imminent danger of serious  
physical injury.

8 28 U.S.C. § 1915(g). As part of the Prison Litigation Reform Act, the Three Strikes Rule was  
9 enacted to help curb non-meritorious prisoner litigation. *See Lomax v. Ortiz-Marquez*, 140 S. Ct.  
10 1721, 1723 (2020) (citations omitted)). Under § 1915(g), prisoners who have repeatedly brought  
11 unsuccessful suits may be barred from bringing a civil action and paying the fee on a payment  
12 plan once they have had on prior occasions three or more cases dismissed as frivolous, malicious,  
13 or for failure to state a claim. *Id.*; *see also Andrews v. Cervantes*, 493 F.2d 1047, 1052 (9th Cir.  
14 2007).

15 For a dismissal to count as a strike, the dismissal had to be on a “prior occasion,” meaning  
16 the order dismissing the case must have been docketed before plaintiff initiated the current case.  
17 *See* § 1915(g). The reviewing court then looks to the basis of prior dismissals. *Knapp v. Hogan*,  
18 738 F.3d 1106, 1109 (9th Cir. 2013). A dismissal counts as a strike when the dismissal of the  
19 action was for frivolity, maliciousness, or for failure to state a claim, or an appeal was dismissed  
20 for the same reasons. *Lomax*, 140 S. Ct. at 1723 (citing Section 1915(g)); *see also Washington v.*  
21 *Los Angeles Cty. Sheriff's Dep't*, 833 F.3d 1048 (9th Cir. 2016) (reviewing dismissals that count  
22 as strikes); *Coleman v. Tollefson*, 135 S. Ct. 1759, 1761 (2015) (dismissal that is on appeal counts  
23 as a strike during the pendency of the appeal). It is immaterial whether the dismissal for failure to  
24 state a claim to count was with or without prejudice, as both count as a strike under § 1915(g).  
25 *Lomax*, 140 S. Ct. at 1727. When a district court disposes of an *in forma pauperis* complaint  
26 requiring the full filing fee, then such a complaint is “dismissed” for purposes of §1915(g). *Louis*  
27 *Butler O'Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008).

Once a prisoner-plaintiff has accumulated three strikes, he/she may not proceed without paying the full filing fee, unless “the complaint makes a plausible allegation” that the prisoner “faced ‘imminent danger of serious physical injury’ at the time of filing” of the complaint. *Andrews v. Cervantes*, 493 F.3d 1047, 1051-52 (9th Cir. 2007) (addressing imminent danger exception for the first time in the Ninth Circuit). The court must construe the prisoner’s “facial allegations” liberally to determine whether the allegations of physical injury are plausible. *Williams v. Paramo*, 775 F.3d 1182, 1190 (9th Cir. 2015).

In order to avail oneself of this narrow exception, “the PLRA requires a nexus between the alleged imminent danger and the violations of law alleged in the prisoner’s complaint.” *Ray v. Lara*, No. 19-17093, \_\_\_ F. 4th \_\_\_, 2022 WL 1073607, at \*6 (9th Cir. Apr. 11, 2022) (adopting nexus test). “In deciding whether such a nexus exists, we will consider (1) whether the imminent danger of serious physical injury that a three-strikes litigant alleges is *fairly traceable* to unlawful conduct asserted in the complaint and (2) whether a favorable judicial outcome would *redress* that injury.” *Id.* at \*7 (adopting test as articulated by Second Circuit, citation omitted). The three-strikes litigant must meet both requirements of the nexus test to proceed. *Id.*

Assertions of imminent danger may be rejected as overly speculative, fanciful, or “conclusory or ridiculous.” *Andrews*, 493 F.3d at 1057, fn. 11. Similarly, “vague and utterly conclusory assertions” of imminent danger are insufficient. *White v. Colorado*, 157 F.3d 1226, 1231–32 (10th Cir. 1998). Instead, the “imminent danger” exception exists “for genuine emergencies,” where “time is pressing” and “a threat . . . is real and proximate.” *Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002). Thus, conditions that posed imminent danger to a plaintiff at some earlier times are immaterial, as are any subsequent conditions. *Andrews*, 493 F.3d at 1053; *Blackman v. Mjening*, 1:16-cv-01421-LJO-GSA-PC, 2016 WL 5815905, at \*1 (E.D. Cal. Oct. 4, 2016).

Upon a finding that the plaintiff is barred by the three strikes provision of 28 U.S.C. § 1915(g), some courts have found that the proper procedure is to dismiss the case without prejudice to re-filing the action upon pre-payment of fees at the time the action is refiled.

1     *Hardney v. Hampton*, No. 2:20-cv-01587-WBS-DMC-P, 2021 WL 4896034, at \*4 (E.D. Cal.  
2 Oct. 20, 2021), *report and recommendation adopted*, No. 2:20-cv-01587-WBS-DMC-P, 2021  
3 WL 6051701 (E.D. Cal. Dec. 21, 2021) (citing *Dupree v. Palmer*, 284 F.3d 1234, 1236 (11th Cir.  
4 2002); *Campbell v. Vance*, No. CIV S-05-1163 RRB, 2005 WL 3288400, at \*1 (E.D. Cal. Nov.  
5 30, 2005). Other courts have first afforded the plaintiff an opportunity to pay the filing fee  
6 before dismissing the case. See *Gorby v. Internal Revenue Service, Fresno*, Case No. 1:21-cv-  
7 320-NONE-HBK, 2021 WL 1339146, *report and recommendation adopted in part and rejected*  
8 *in part*, 2021 WL 2227810 (E.D. Cal. June 2, 2021)(rejected immediate dismissal, instead  
9 permitting 30 days to pay filing fee, and if not, then requiring dismissal); *Trujillo Cruz v. White*,  
10 No. 2:19-cv-1304-KJM-DMC, 2019 WL 4917192 (Oct. 4, 2019), *report and recommendation*  
11 *adopted in part and rejected in part*, *Trujillo-Cruz v. White*, 2020 WL 1234201 (E.D. Cal. March  
12 13, 2021)(rejected immediate dismissal, instead permitting 30 days to pay filing fee, and if not  
13 then requiring dismissal).

14        The preceding law must be taken in the context of congressional intent when enacting the  
15      Prison Litigation Reform Act. As the United States Supreme Court noted in *Lomax*, “[t]he point  
16      of the PLRA . . . was to cabin not only abusive but also simply meritless prisoner suits.” *Lomax*,  
17      140 S.Ct. at 1726. And the three strikes provision, in particular, was aimed “to disincentivize  
18      frivolous prisoner litigation.” *Hoffman v. Pulido*, 928 F.3d 1147, 1148-49 (9th Cir. 2019).

## ANALYSIS

**A. Plaintiff has three or more qualifying strikes**

21 A review of the Pacer Database reveals Plaintiff has filed at least 49 civil actions or  
22 appeals in a court of the United States. The Court identifies the following cases, although not  
23 exhaustive, which are properly deemed qualifying § 1915(g) strikes, entered before Plaintiff  
24 commenced the instant action:

Date of Order	Case Style	Disposition
May 9, 2016	<i>Ruiz v. McGuire</i> , Case No. 3:16-cv-03880-AJB-BLM (S.D. Cal. 2016)	Order dismissing complaint for failure to state a claim and failure to comply with the

1		court's order directing plaintiff file an amended complaint. This dismissal for qualifies as a strike under <i>Harris v. Mangum</i> , 863 F.3d 1133, 1143 (9th Cir. 2017) ("Accordingly, we hold that when (1) a district court dismisses a complaint on the ground that it fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff then fails to file an amended complaint, the dismissal counts as a strike under § 1915(g).").
10	May 30, 2018	<i>Ruiz v. Curry</i> , Case No. 1:17-cv-1454-DAD-SAB (E.D. Cal. 2017)
11	November 22, 2019	<i>Ruiz v. Curry</i> , Case No. 19-16456 (9th Cir. 2019)
12		Order adopting findings and recommendations to dismiss complaint for failure to state a claim.
13		Order dismissing appeal as frivolous under 28 U.S.C. § 1915(e)(2) and denying motion to proceed to proceed <i>in forma pauperis</i> on appeal .
14		
15		

At least one other judge in this Court has previously found Plaintiff has accrued at least three strikes and is subject to § 1915(g)'s bar absent a showing of the imminent danger exception. See *Ruiz v. Woodfill*, Case No. 2:20-cv-0205-KJM-AC (E.D. Cal. 2020). As evidenced above, Plaintiff has had three or more qualifying strikes for purposes of § 1915(g).

## B. The Imminent Danger Exception Does Not Apply

Because Plaintiff has three-qualifying strikes, he may not proceed IFP unless the Complaint contains plausible allegations that Plaintiff is in imminent danger of serious physical injury as of the date the Complaint is filed. Because the Complaint was written primarily in Spanish, the undersigned requested the Court's staff interpreter to conduct an informal sight translation of the document. Liberally construing the Complaint, Plaintiff's allegations fail to meet § 1915(g)'s imminent physical danger exception.

The gravamen of the Complaint concerns an excessive use of force incident that occurred on June 3, 2021. (Doc. No. 1 at 3-10). Plaintiff alleges that on this date he was subjected to

1 excessive force, issued a falsified RVR related to the incident, subjected to racial discrimination  
 2 because he was not provided an interpreter at the correctional institution, and his cane was  
 3 destroyed. (*Id.*). The allegations, however, do not show Plaintiff was under imminent threat of  
 4 serious physical injury at the time he filed the Complaint because the incident giving rise to the  
 5 cause of action occurred on June 3, 2021, eight months before he filed the Complaint.<sup>2</sup> (*Id.* at 3-  
 6 10). Furthermore, there are no allegations of a continuing violation or stated facts indicating an  
 7 ongoing pattern of physical harm. *See Andrews*, 493 F.3d at 1056-57 (“[A] prisoner who alleges  
 8 that prisoner official continued with a practice that has injured him or others similarly situated in  
 9 the past will satisfy the ‘ongoing danger’ standard...”). Consequently, because the Complaint  
 10 does not contain plausible allegations that Plaintiff “faced ‘imminent danger of serious physical  
 11 injury’ at the time of filing” of the complaint, he is not entitled to rely upon the exception to  
 12 proceed IFP. *Andrews v. Cervantes*, 493 F.3d 1047.

### 13           C. Dismissal for Plaintiff’s non-compliance under Rule 41(b)

14           Alternatively, because Plaintiff has failed to comply with the Court’s May 4, 2022 Order  
 15 directing that the file an Amended Complaint in English, the undersigned recommends a  
 16 dismissal for failure to prosecute and/or comply with a court order. Plaintiff is no stranger to the  
 17 federal courts. Plaintiff has initiated more than 42 federal civil actions in the federal courts.  
 18 Notably, the complaint filed in this case is written entirely in Spanish despite numerous court  
 19 orders admonishing Plaintiff that pleadings filed in federal court must be written in English. *See*  
 20 *e.g. Ruiz v. Mobert*, Case No. 1:17-cv-709-AWI-BAM (E.D. Cal. 2017)((Doc. No. 18) striking  
 21 the complaint and directing Plaintiff to file complaint written in English); *Ruiz v. Curry*, Case No.  
 22 1:17-cv-1454-DAD-SAB (E.D. Cal. 2017)((Doc. No. 11) directing Plaintiff to file an amended  
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24           <sup>2</sup> As informally translated by the court’s interpreter, Plaintiff repeats the excessive use of force incident on  
 25 each page of the Complaint, alleging correctional officials falsified an RVR blaming him for attacking  
 26 correctional officers and instead attacked him while he was restrained on the ground by delivering kicks to  
 27 his head, face, and “testicular area.” (Doc. No. 1 at 3-5). Albeit paradoxical, Plaintiff alleges during the  
 28 excessive force incident a correctional official insulted him in English, but he didn’t understand,  
 prompting the correctional officer to get frustrated. (*Id.* at 4). As a result of the excessive use of force  
 incident, Plaintiff states he suffered injuries including a broken molar, face/head lacerations, an inflamed  
 right eye, and “inflamed testicles.” (*Id.* at 3-5).

1 complaint because the complaint was written in both English and Spanish); *Ruiz v. Woodfill*, Case  
 2 No. 2:19-cv-2118-MCE-KJN, 2021 WL 1060141, at \*1-\*2 (E.D. Cal. March 18, 2021)(collecting  
 3 cases advising Plaintiff to file pleadings in English and further providing documentation that  
 4 Plaintiff falsely alleged he cannot write or understand English); *Ruiz v Sadler*, Case No. 2:19-cv-  
 5 147EFBN (E.D. Cal. 2019)(same)); *Ruiz v. Woodfill*, Case No. 2:20-cv-205-KJM-AC, 2021 WL  
 6 606255, at \*1 (E.D. Cal. Jan. 28, 2021)(reviewing motion for reconsideration and advising  
 7 Plaintiff must file pleadings in English).

8 Federal Rule of Civil Procedure 41(b) permits the court to involuntarily dismiss an action  
 9 when a litigant fails to prosecute an action or fails to comply with other Rules or with a court  
 10 order. See Fed. R. Civ. P. 41(b); *see Applied Underwriters v. Lichtenegger*, 913 F.3d 884, 889  
 11 (9th Cir. 2019) (citations omitted). Local Rule 110 similarly permits the court to impose  
 12 sanctions on a party who fails to comply with the court’s Rules or any order of court.

13 Before dismissing an action under Fed. R. Civ. P. 41, the court *must* consider: (1) the  
 14 public interest in expeditious resolution of litigation; (2) the court’s need to manage a docket; (3)  
 15 the risk of prejudice to defendant; (4) public policy favoring disposition on the merits; and (5) the  
 16 availability of less drastic sanctions. *See Applied Underwriters*, 913 F.3d at 889 (noting court  
 17 that these five factors “must” be analyzed before a Rule 41 involuntarily dismissal) (emphasis  
 18 added); *Malone v. U.S. Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987) (reviewing five factors  
 19 and independently reviewing the record because district court did not make finding as to each);  
 20 *but see Bautista v. Los Angeles County*, 216 F.3d 837, 841 (9th Cir. 2000) (listing the same, but  
 21 noting the court *need not* make explicit findings as to each) (emphasis added); *Ferdik v. Bonzelet*,  
 22 963 F.2d 1258, 1260 (9th Cir. 1992) (affirming dismissal of *pro se* § 1983 action when plaintiff  
 23 did not amend caption to remove “et al” as the court directed and reiterating that an explicit  
 24 finding of each factor is not required by the district court).

25 The undersigned considers each of the above-stated factors and concludes dismissal is  
 26 warranted in this case. As to the first factor, the expeditious resolution of litigation is deemed to  
 27 be in the public interest, satisfying the first factor. *Yourish v. California Amplifier*, 191 F.3d 983,  
 28 990-91 (9th Cir. 1999). Turning to the second factor, the Court’s need to efficiently manage its

1 docket cannot be overstated. This Court has “one of the heaviest caseloads in the nation,” and  
2 due to unfilled judicial vacancies, which is further exacerbated by the Covid-19 pandemic,  
3 operates under a declared judicial emergency. *See* Amended Standing Order in Light of Ongoing  
4 Judicial Emergency in the Eastern District of California. The Court’s time is better spent on its  
5 other matters than needlessly consumed managing a case with a recalcitrant litigant.

Indeed, “trial courts do not have time to waste on multiple failures by aspiring litigants to follow the rules and requirements of our courts.” *Pagtalunan v. Galaza*, 291 F.3d 639, 644 (9th Cir. 2002) (Trott, J., concurring in affirmance of district court’s involuntary dismissal with prejudice of habeas petition where petitioner failed to timely respond to court order and noting “the weight of the docket-managing factor depends upon the size and load of the docket, and those in the best position to know what that is are our beleaguered trial judges.”). Delays inevitably have the inherent risk that evidence will become stale or witnesses’ memories will fade or be unavailable and can prejudice a defendant, thereby satisfying the third factor. *See Sibron v. New York*, 392 U.S. 40, 57 (1968). Finally, the instant dismissal is a dismissal *without* prejudice, which is a lesser sanction than a dismissal with prejudice, thereby addressing the fifth factor.

16 After considering the factors set forth *supra* and binding case law, the undersigned  
17 alternatively recommends dismissal, without prejudice, under Fed. R. Civ. P. 41 and Local Rule  
18 110.

19 || Accordingly, the Court **RECOMMENDS:**

20           1. The district court DENY Plaintiff's motion to proceed *in forma pauperis* (Doc.  
21 No. 2) under § 1915(g) due to his three-strike status and his failure to meet the imminent danger  
22 exception and DISMISS the action without prejudice after affording Plaintiff an opportunity to  
23 pay the filing fee.

24       2.     Or, in the alternative, or in addition to the above, the district court DISMISS the  
25 action due to Plaintiff's failure to timely comply with the Court's orders to file an Amended  
26 Complaint in English and/or prosecute his action.

## NOTICE TO PARTIES

28 These findings and recommendations will be submitted to the United States district judge

1 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14)**  
2 **days** after being served with these findings and recommendations, a party may file written  
3 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s  
4 Findings and Recommendations.” Parties are advised that failure to file objections within the  
5 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,  
6 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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Dated: July 15, 2022

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HELENA M. BARCH-KUCHTA  
UNITED STATES MAGISTRATE JUDGE